(4)

Single Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

CHHATTISGARH

CRIMINAL APPEAL NO. 60 **/2006**

APPELLANT : Chhoti Munni @ Nisha
IN JAIL W/o Shailesh Rao,
Aged about 30 years,
Occupation House wife,
R/o Ahamad Nagar, Camp-II,
Bhilai, P.S. Chhaoni, District
Durg C.G.

VERSUS

RESPONDENT : The State of Chhattisgarh
Through : P.S. Chhawani,
Distt. Durg (C.G.)

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by Shri Nisha Chaturvedi Advocate

CRIMINAL APPEAL UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL PROCEDURE

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.60/2006

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Chhoti Munni @ Nisha

Versus

The State of Chhattisgarh

Shri R. K.Jain, Counsel for the appellant.

Shri Sushil Dubey, Government Advocate for the State.

JUDGMENT

(Delivered on this 04th day of May 2006)

This appeal is directed against the judgment dated 19th December 2005 delivered by Shri A. R. Dhruv, Special Judge, N.D.P.S.Act, Durg in Special Case No. 01/2005 whereby the appellant was convicted under Section 8 (c) read with Section 20 (b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and was sentenced to undergo rigorous imprisonment for four years and a fine of Rs.10,000/- and in default to undergo additional R.I. for six months.

2. Briefly stated the prosecution story is that Sub-Inspector K.K.Nag P.W.8 of Police Station Chhaoni upon receiving secret information that the appellant is in possession of *ganja* at her house, recorded the secret information so received and after informing the senior police officials proceeded to the house of the appellant along with staff and witnesses Rajjak Khan P.W.1 and Smt. Razia Khan P.W.6. After recording reasons for not

obtaining a search warrant, Sub-Inspector K.K.Nag searched the house of the appellant and saw that in one room below the cot one packet was kept in which *ganja* like substance was found. Weighment of the seized substance was done by Eknath P.W.3 and it was found to contain 8.350 gms. of *ganja*. Out of the aforesaid substance, 3 samples of 50 grams each were taken and were sealed. The packet was also sealed. A specimen impression of seal was affixed on the seizure memo Ex.P.8. The seized substance was handed over to Head Constable Manharanlal P.W.7 for safe custody at the *Malkhana*. On 3.12.2005 vide memo Ex.P.15 two packets of 50 grams each were sent for chemical analysis to the F.S.L. Vide report Ex.P.27, the Forensic Science Laboratory opined that both the packets contained *ganja*. After completion of investigation, the appellant was prosecuted under Section 20 (b) read with Section 8 (c) of the Act.

3. The appellant abjured the guilt and pleaded innocence. The prosecution examined as many as eight witnesses. Relying upon the sole testimony of Sub-Inspector K.K. Nag P.W.8 and the report of F.S.L. Ex.P.27, the learned trial Judge convicted and sentenced the appellant as aforesaid in paragraph 1 (supra).

4. Shri R.K.Jain, learned counsel for the appellant has assailed the conviction of the appellant on the ground that independent witnesses Rajjak Khan P.W.1 and Smt. Razia Khan P.W.6 did not support the prosecution story. It was also argued that the prosecution has failed to prove that the *ganja* was seized from the conscious possession of the appellant. There was total non-compliance of Section 55 of the Act since the seized substance before being entrusted for safe custody at the

Malkhana was not sealed by the Officer-in-Charge of the concerned Police Station. The memo of Superintendent of Police Ex.P.15 did not mention the name of Constable through whom the two samples were sent for analysis to the F.S.L. The report of the F.S.L. revealed that the samples were received on 4.12.2004. No specimen impression of the seal used to seal the samples was sent to the F.S.L. Therefore, the possibility that the sample sent for analysis to the F.S.L. was tampered with could not be ruled out. On these grounds, Shri Jain, learned counsel for the appellant prayed that the conviction and sentence awarded by the trial judge deserve to be set aside. On the other hand, learned counsel appearing for the State argued in support of the impugned judgment.

5. Having considered the rival submissions, I have perused the record. In a case of the present nature, it is the duty of the prosecution to establish beyond doubt that the *ganja* was seized from the conscious possession of the appellant. Sub-Inspector K.K. Nag has, in para 20 of his testimony, stated that when he reached the house of the appellant, it was locked. He did not mention that the lock was opened by the appellant. The above fact was also not mentioned by Sub-Inspector K.K.Nag in the F.I.R. Ex.P.24. Independent witnesses Rajjak Khan, P.W.1 and Smt. Razia Khan P.W.6 also did not support the prosecution story and stated that their signatures were obtained by the police on all the documents at one time. It is pertinent to note that spot map prepared by Patwari B.C.Meshram P.W.2 vide Ex.P.10 on 20.12.2004 does not bear the signatures of any witnesses. Patwari B.C.Meshram admitted in

paragraph 2 of his testimony that he signed as witness Rajjak Khan since despite being called the witness did not come. This witness has further admitted in paragraph 3 that he did not enter the house of the appellant. The manner in which the spot map was prepared creates a doubt in the prosecution story. Sub-Inspector K.K.Nag P.W.8 has admitted in paragraph 12 that the appellant lived in the house along with her family members. It is not shown whether the husband or children of the appellant were present at the house or not. It is also pertinent to note that the seizure memo Ex.P.8 does not mention that the *ganja* like substance was seized from the house of the appellant. It only describes the place of seizure as Ahmed Nagar Camp, Near Pandu Kirana Shop. This creates a serious dent in the prosecution story and further renders doubtful that *ganja* like substance was seized from the conscious possession of the appellant.

6. It is noteworthy that almost in each and every document prepared by Sub-Inspector K.K.Nag P.W.8 specific time has been mentioned. However, the weighment *panchnama* Ex.12 and the sample *panchnama* Ex.P.13 neither bears the time nor the signature of any witness. It is not disputed that till preparation of these documents the seized substance was not sealed. The prosecution story that in presence of the appellant three samples of 50 grams each were taken out from the *ganja* seized from her house and were sealed is thus rendered extremely doubtful. No reason is forthcoming as to why the signature of the appellant or the witnesses were not taken on these two vital documents.

7. Under Section 55 of the Act of 2000, it is the duty of the Officer-in-Charge of the concerned Police Station to affix his seal on the samples being entrusted for safe custody at *Malkhana* as a measure to prevent tampering with the samples. In the present case, it is not disputed that a separate specimen impression of the seal was not prepared and was not entrusted to Head Constable Manharanlal P.W.7 along with samples and the bag containing 8.350 grams *ganja* at the Police Station. Head Constable Manharanlal P.W.7 has in paragraph 4 clearly admitted that Sub-Inspector K.K.Nag did not put any identification mark on the samples in his presence. The seizure memo Ex.P.8 shows that one packet containing 8.200 grams of *ganja* and three sample packets containing 50 grams of *ganja* were seized. The same details are also recorded in the *Malkhana* register Ex.P.18. It is, however, pertinent to note that Eknath P.W.3 who had weighed the substance alleged to have been seized from the house of the appellant has categorically stated in para-1 that after weighment the seized substance was about 12 - 13 Kgs. This witness was not cross-examined by the prosecution and also was not declared hostile. He has also stated categorically in paragraph 4 that after weighment of the substance the police had not affixed any seal thereupon and had merely taken his signatures. The testimony of Eknath P.W.3 renders the prosecution story doubtful since there is a material variance in the quantity alleged to have been seized from the house of the appellant and the quantity weighed by Eknath P.W.3.

8. The memo of Superintendent of Police Ex.P.15 does not show the name of the Constable to whom the samples were

entrusted for being taken to the F.S.L. It also does not show that a specimen impression of the seal was separately sent to the F.S.L. A perusal of the specimen impression of the seal affixed on seizure memo Ex.P.8 shows that it bears the letters "K.R.B.S.C./O.I.C./MPB". It is not clear that whether this was an official seal or some private seal used by Sub-Inspector K.K.Singh. The report of F.S.L. Ex.P.27 shows that the samples were received at Raipur on 4.12.2004 through one Constable Rohit Markam P.W.5 but the memo of Superintendent of Police is dated 3.12.2004. Head Constable Rohit Markam P.W.5 has stated that he had received samples on 4.12.2004. A copy of the *Malkhana* register Ex.P.18 proved by the prosecution also does not show on what date and at what time the sample was taken out from the *Malkhana* and was handed over to him. In view of the facts and circumstances mentioned above, the possibility that the samples sent for analysis to the F.S.L. could have been tampered with cannot be ruled out.

8. Having thus considered the evidence led by the prosecution in its entirety, the following facts emerge:

i. Independent witnesses Rajjak Khan P.W.1 and Smt. Razia Khan P.W.6 did not support the prosecution story.

ii. There was material variance in the quantity of *ganja* alleged to have been seized from the house of the appellant and the quantity weighed by Eknath P.W.3. The testimony of Eknath P.W.3 revealed that after weighment, the substance was not sealed.

iii. There is total non-compliance of Section 55 of the Act since the Station House Officer did not affix his seal upon the samples and the packet containing *ganja* entrusted for safe custody at the *Malkhana*.

iv. The evidence led by the prosecution does not establish beyond doubt that the *ganja* was seized from the conscious possession of the appellant.

v. Non-mention of the fact that the *ganja* was seized from the house of the appellant in seizure memo Ex.P.8 also renders the prosecution story doubtful.

vi. The possibility that the substance examined by the F.S.L. could have been tampered with could not be ruled out.

In view of the above, I am of the considered opinion that the conviction and sentence awarded by the learned trial Judge deserve to be set aside.

10. In the result this appeal is allowed. Conviction of the appellant under Section 20(b)(ii)(B) read with Section 8 (c) of the Act and the sentence awarded thereunder are set aside. The appellant is acquitted and shall be set at liberty forthwith, if not required in any other case. Fine, if paid, shall be refunded to the appellant.

Sd/-
Dilip Raosaheb Deshmukh
Judge

04.05.2006